Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner,

—V.—

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 1, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner,
v.
ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 1, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

APPENDIX

Attorneys for Petitioner:

SLADE GORTON
Attorney General, State of Washington
RICHARD H. HOLMQUIST
Senior Assistant Attorney General
MATTHEW J. COYLE
Assistant Attorney General

Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

Attorneys for Respondents:

JOHN T. PIPER, ESQ.
MAX KAMINOFF, ESQ.
D. MICHAEL YOUNG, ESQ.
BOGLE & GATES

The Bank of California Center
Seattle, Washington 98164
Telephone: (206) 682-5151

SUBJECT INDEX

	Page
Relevant Docket Entries	1
Petition for Declaratory Judgment on Validity of Rule	3
Answer	7
Oral Decision of the Trial Court	8
Findings of Fact and Conclusions of Law	15
Judgment Declaring Department of Revenue Rule Invalid	19
Opinion of Washington Supreme Court	App. A to Petition for Writ of Certiorari
Remittitur of Washington Supreme Court	App. B to Petition for Writ of Certiorari

RELEVANT DOCKET ENTRIES

Title of Case:

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,
Respondents.

DATE	PROCEEDINGS	APPENDIX PAGE NO.
1975		
January 29, 1975	Petition for Declaratory Judgment on Validity of Rule	3
February 7, 1975	Petitioners' Motion for Judgment on the Pleadings.	
February 18, 1975	Answer (of Department of Revenue)	7
February 27, 1975	Respondent's Motion for Dismissal or Summary Judgment Pursuant to CR 12 and CR 56	
March 13, 1975	Petitioners' Brief in Support of Motion for Judgment on the Pleadings	
April 21, 1975	Respondent's Memorandum on Motion for Judgment on the Pleadings	
June 24, 1975	Reply Brief of Petitioners in Support of Motion for Judgment on the Pleadings.	
June 26, 1975	Argument to and Oral Decision by Thurston County Superior Court, Hon. Frank E. Baker, Judge	8
November 24, 1975	Findings of Fact and Conclusions of Law	15

Date	Proceedings	Appendix Page No.
November 24, 1975	Judgment Declaring Department of Revenue Rule Invalid	19
December 23, 1975	Notice of Appeal to Washington State Court of Appeals, Division II	
1976		
February 13, 1976	Agreed Statement of Facts.	
March 8, 1976	Order of Certification to the Supreme Court of Washington	
March 9, 1976	Supreme Court of Washington Accepted Certification..	
March 29, 1976	Brief of Appellant	
April 29, 1976	Brief of Respondents	
September 22, 1976	Appellant's Reply Brief ...	
October 4, 1976	Oral Argument Before Supreme Court of Washington	
1977		
February 3, 1977	Opinion of Supreme Court of Washington Filed ...	App. A to Petition for Writ of Cert.
March 7, 1977	Remittitur of Supreme Court of Washington ...	App. B to Petition for Writ of Cert.
June 1, 1977	Petition for Writ of Certiorari to the Supreme Court of the State of Washington	
July 15, 1977	Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.	
October 3, 1977	Order Granting Petition for Writ of Certiorari to the Supreme Court of the State of Washington	

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

PETITION FOR DECLARATORY JUDGMENT ON VALIDITY OF RULE

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

VS.

THE DEPARTMENT OF REVENUE,

Respondents.

Petitioners state as follows:

I.

The Association of Washington Stevedoring Companies is an unincorporated association of private companies engaged in the stevedoring business. The Washington Public Ports Association is a nonprofit corporation having a membership consisting of certain port authorities in the State of Washington that engage in stevedoring activities.

II.

The Department of Revenue has been established by law as a department of Washington State government. Its chief executive officer has been designated the Director of Revenue.

III.

The Director, acting through the Department, is authorized and directed to make, adopt and publish such rules and regulations as he may deem

necessary or desirable to carry out the powers and duties imposed upon him (or the Department) by the legislature.

IV.

The predecessor of the Department was the Tax Commission of the State of Washington. The Tax Commission, after the enactment of the Business and Occupation Tax (Chapter 180, Laws of 1935), adopted its Rule 198 making the tax applicable to compensation received by a stevedoring company for loading and unloading vessels engaged in interstate commerce. That rule remained in effect until the decision by the United States Supreme Court in *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 82 L. ed. 68 (1937), which held the tax on the stevedoring activities there in issue unconstitutional. The Tax Commission's rules and regulations, as revised May 1, 1939, reflected a change in the rule to exclude from the Business and Occupation Tax compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company. The rule thereafter remained substantially the same until May 3, 1974.

V.

On May 3, 1974, the Department adopted its revised Rule 193-D providing in part:

"3. Compensation received by contracting,

stevedoring or loading companies for services performed within this state is taxable".

The Business and Occupation Tax law under which the revised rule was adopted remains the same as the law at issue in *Puget Sound Stevedoring, supra.*

VI.

The private stevedoring companies that constitute the petitioner Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co. v. State Tax Commission, supra.* Many of the port authority members of the petitioner Washington Public Ports Association are also engaged in such activity. Accordingly, the threatened application of the Department's revised Rule 193-D confers on petitioners standing to bring this action pursuant to RCW 34.04.070.

VII.

The Department's revised Rule 193-D is invalid because it violates the commerce clause, Article I, Section 8, of the United States Constitution (empowering Congress to regulate commerce with foreign nations and among the several states). The rule is also invalid to the extent that it affects foreign commerce covered by the import-export clause contained in Article I, Section 10 of the United States Constitution.

WHEREFORE, petitioners pray for a judgment declaring the Department's revised Rule 193-D invalid as violating the aforesaid clauses of the

United States Constitution, and for such other relief as may seem proper.

BOGLE & GATES
JOHN T. PIPER
Attorneys for Petitioners

DATED: January 27, 1975

[Affidavit of Service omitted in printing]

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES and WASHINGTON PUBLIC PORTS ASSOCIATION, *Petitioners,* vs. THE DEPARTMENT OF REVENUE, *Respondent.*	No. 51818 ANSWER

The Respondent admits Paragraphs I, II, III, IV, V, and VI and denies Paragraph VII of Petitioners' Petition for Declaratory Judgment.

DATED this 13th day of February, 1975.

SLADE GORTON
Attorney General
RICHARD D. HICKS
Assistant Attorney General
Attorneys for Respondent.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

THE DEPARTMENT OF REVENUE,

Respondent.

ORAL DECISION OF THE COURT
(June 26, 1975)

THE COURT: As both of you gentlemen have pointed out in your briefs, the Court is placed in a very awkward position concerning a determination of this matter. First of all, I think that I should comment that Judge Henry in his case, as has been pointed out by Mr. Hicks, was able to draw a distinction, and therefore he as well as the appellate courts of which Mr. Hicks mentions were able to dodge the bullet of ruling specifically on the basic cases here in question. Contrary thereto this Court is faced head on with Puget Sound and Carter and Weekes cases.

It would seem to the Court in light of the cases which have been argued and so thoroughly briefed that there certainly is a swing away from the Puget Sound and Carter and Weekes cases. We are here involved primarily with the Interstate Commerce

clause and the import/export clause. It is true, as counsel for the petitioners advocates, that the cases cited which would infer meaning contrary to the basic cases are not stevedoring cases, and it is true, further, as he has pointed out, that the stevedoring cases involve transportation, and the primary case of Western Livestock did not so involve but involved a type of sales operation. Western Livestock is perhaps the first indication of a break from the Puget Sound and Carter and Weekes cases. It is likewise true, as counsel for petitioners sets forth, that we do have a yearly chronology of the opinions of the court, and from Puget Sound and Carter and Weekes up and through Spector we find in those opinions of the intermediate cases the theory which would seem to be adverse to the basic cases.

It is difficult for this Court to compare these cases and come up with any true answer, and to analyze them would indicate the swing of which the State proposes. The argument concerning goods and activities, goods as distinguished from activities, that activities under the specific Constitutional provisions seem to be losing their protection as compared to goods themselves is certainly obvious. The one difficulty the Court sees is in the Puget Sound and Carter and Weekes cases, that is, they're specifically stating that stevedoring is a part of interstate commerce as distinguished from intrastate or local activity, as the State makes clear, and I assume that this must be upon the basis that the burden by state imposition of tax in its orderly continuity of inter-

state commerce would be such that stevedoring must be a part thereof.

Now, it goes without saying that the theory of the cases, with the fact that the stevedoring in this case is merely loading and unloading by local employees, the complete activity being local in nature, is difficult to analyze in relation to Puget Sound and Carter and Weekes. The second argument that has emerged from the succession of cases, of course, is the argument over regulation, and it is true that there have been distinctions made in that regard as to whether or not there is a sufficient regulation to negate the tax, or if we create a situation where the necessary taxable conditions are met that it would be taxable whether it be intra or interstate. Then, of course, we have the theory through the cases of the right of apportionment, as is true in the New York case and Michigan case.

Now, Mr. Hicks would have the Court say that I must take this as a case of first impression, the case before the Court, and the Court would have to conclude that through the years and based upon the arguments of the State of Washington if I were to take this case as one of first impression it would be relatively easy for this Court to find in light of the cases cited that the State of Washington would have the right to tax by way of B&O, it being a local activity, it being not a regulation, or if we wish to use the apportionment approach that that likewise perhaps could be applicable in theory. Of course, we

don't have that problem at this time under the facts. I only indicate that the new approach, as is pointed out by the State, certainly would seem to be logical and of a more modern tendency.

The Court also notes the attitude of the strong minority in these cases, and perhaps the attitude of the professional experts, as well as the tendency of the various state courts to veer from meeting the issue of Puget Sound and Carter and Weekes head on. As has been pointed out, we reach a very fine line in this determination. The Court has examined the Smith case here in our State, and also, of course, the cases in issue, and this Court might feel if it were a case of first impression that it would have the right and privilege as a trial court to make a proper, reasonable, logical conclusion as a result thereof. It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years, and it seems to this Court that there must be a good reason therefor, as per the opinions of the members of our Supreme Court of the United States at that time as they pertained to those facts. The fact of the matter is the Supreme Court since those initial cases has not determined and has not found nor declared that stevedoring activity such as we have before the Court is local activity, and the Court must conclude then

in light of that factor it still is a part of the continuous flow of interstate commerce under the Interstate Commerce clause. It stands out like a sore thumb. And I would be inclined to agree as the years have gone by that the factual situations that exist now are different than they were then to the extent that the so-called new approach would seem more practical and more reasonable. The duty of the Superior Court of this County in relation to the decision of the Supreme Court of the United States is such that it is difficult for me to become Caesar.

Now, the State argues that based upon the flurry of cases which have occurred that thereby there has been a reversal of those basic cases of Puget Sound and Carter and Weekes by implication, and if I don't have the right to do it by implication then the Supreme Court of the State of Washington has indicated in its attitude that it is sufficient for me to find an invitation to overturn a case of the United States Supreme Court of which they at least have not specifically so stated except by other opinions subsequent in time. Well, I believe it goes without saying that I don't believe the Supreme Court perhaps can dictate to me anymore than they would be in the same position as it relates to a decision of the United States Supreme Court. I can only comment in that regard that if the State Supreme Court wishes in their wisdom, being nine in number, that is, desires to tackle the situation so that it is again confronting the United States Supreme Court, they certainly may be my guest, but I do not find that just on the basis

of the history of the cases, when there in fact has been no overturning of the Puget Sound and Carter and Weekes cases, that I can find I have the right to overrule those cases based upon implication, nor can I find that the Supreme Court's decisions actually in fact indicate an invitation to do so, because the Smith case does not specifically say that it is bad law, it only indicates that as to that particular case, well, they didn't say "apply" but Justice Finley's use of words was not proper as they applied to the Court's feeling as such.

It goes without saying, as all counsel realize, that the issue here is a head-on confrontation with cases of which are still the law of the land. I can find no invitation, I can find no implication of which would necessitate this Court in making a different ruling, or in fact legally being able to do so. And I want it understood that the Court in no way is attempting to dodge a bullet. We know that this is going to be a test case as it progresses through the various Appellate Courts, and I think rightfully so, but I do not believe this Court has the authority to join in an academic yo-yo and come up with a number of pearls of wisdom of which in either event would not be anything but lost in the shuffle as we progress through the various Appellate Courts to the Supreme Court of the United States.

Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implica-

tion, nor has there been an invitation to anyone to reverse those cases. I would agree with counsel for the petitioner that if that is to be done they should do it at such time as the proper determinations could be made accordingly.

This in no way reflects what this Court might do if this were a case of first impression, but the Court is bound by the decision of the United States.

I will sign the appropriate pleadings in accordance therewith.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF THURSTON } ss.

I, GENE BARKER, an Official Court Reporter of the State of Washington, do hereby certify that the foregoing transcript of the Oral Decision of the Court, presented in the above-entitled and numbered Cause by the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, on the 26th day of June, 1975, was reported by me on said date and reduced to typewriting under my direction.

I further certify that said transcript of the Oral Decision of the Court, as above transcribed, is a full, true and correct transcript of the machine shorthand notes of the aforementioned matter.

DATED AND SIGNED this..... day of August, 1975.

.....
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on before the undersigned Judge of the above-entitled Court on cross motions for judgment on the pleadings by Petitioners and Respondent, and the Court having considered the pleadings and written and oral arguments of the parties,

NOW, THEREFORE, the Court makes the following

FINDINGS OF ADMITTED FACT

Respondent, by its answer, has admitted certain allegations of the petition which are as follows:

1. The Association of Washington Stevedoring Companies is an unincorporated association of private companies engaged in the business of stevedoring. The Washington Public Ports Association is a

nonprofit corporation having a membership consisting of certain port authorities in the State of Washington that engage in stevedoring.

2. The Department of Revenue has been established by law as a department of Washington State government. Its chief executive officer has been designated the Director of Revenue.

3. The Director, acting through the Department, is authorized and directed to make, adopt and publish such rules and regulations as he may deem necessary or desirable to carry out the powers and duties imposed upon him (or the Department) by the legislature.

4. The predecessor of the Department was the Tax Commission of the State of Washington. The Tax Commission, after the enactment of the Business and Occupation Tax (Chapter 180, Laws of 1935), adopted its Rule 198 making the tax expressly applicable to compensation received by a stevedoring company. The attempted implementation of that rule led to the decision by the United States Supreme Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L. ed 68 (1937), which held the tax on stevedoring activities serving vessels engaged exclusively in interstate or foreign commerce to be unconstitutional. The Tax Commission's rule was thereafter changed to exclude from the Business and Occupation Tax compensation received by a contracting stevedoring company for loading and unloading cargo from ves-

sels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company. The rule remained substantially the same until May 3, 1974.

5. On May 3, 1974, the Department adopted its revised Rule 193-D providing in part:

> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable".

The Business and Occupation Tax law under which the revised rule was adopted remains the same as the law at issue in *Puget Sound Stevedoring Co., supra.*

6. The private stevedoring companies that constitute the petitioner, Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co., supra.* Many of the members of petitioner, Washington Public Ports Association, are also engaged in such activities. Accordingly, the application of the Department's revised Rule 193-D confers on petitioners standing to bring this action pursuant to RCW 34.04.070.

Based upon the foregoing admitted facts, the Court makes the following

CONCLUSIONS OF LAW

1. The United States Supreme Court cases of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 and *Joseph v. Carter & Weekes Co.*, 330

U.S. 422, are the law of the land and have not been reversed expressly or by implication, nor has there been any invitation from the Supreme Court to reverse such cases.

2. The Department's revised Rule 193-D is invalid to the extent it relates to compensation derived by stevedoring or loading companies for loading cargo on, and unloading cargo from, vessels where such cargo is moving in interstate or foreign commerce and where the work is directed and controlled by the stevedoring or loading company because the revised rule, to that extent, violates "the commerce clause" (in Article I, Section 8) and "the import-export clause" (in Article I, Section 10) of the United States Constitution.

DATED this 24th day of November, 1975.

/s/ Frank E. Baker
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

JUDGMENT DECLARING DEPARTMENT OF REVENUE RULE INVALID

Based upon the Findings of Admitted Fact and Conclusions of Law made and entered in this matter, it is hereby

ORDERED, ADJUDGED AND DECREED that the Department's revised Rule 193-D is invalid to the extent it relates to compensation derived by stevedoring or loading companies for loading cargo on, and unloading cargo from, vessels where such cargo is moving in interstate or foreign commerce and where the work is directed and controlled by the stevedoring or loading company because the revised rule, to that extent, violates "the commerce clause" (in Article I, Section 8) and "the import-export clause" (in Article I, Section 10) of the United States Constitution.

DATED this 24th day of November, 1975.

/s/ Frank E Baker
Judge